BRB No. 91-334

ALDWIN C. BRUNO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
BETHLEHEM STEEL CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

Bernard G. Link, Lutherville, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-2170) of Administrative Law Judge Victor J. Chao denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant has worked as a welder at employer's Sparrows Point shipyard since 1969. On July 26, 1988, claimant underwent an audiological evaluation, the results of which revealed that claimant has a 19.4 percent binaural impairment. Emp. Ex. 3; Tr. at 4. Claimant filed a claim for his work-related injury. Between July 27, 1988 and January 29, 1990, claimant underwent five additional hearing evaluations, the results of which all differ. Four of the five reports indicate claimant's loss is a noise-induced sensorineural loss. Cl. Ex. 3 at 10, 13; Cl. Ex. 5, 7, 8; Emp. Ex. 1, 3.

After examining claimant three times, Dr. Rosell concluded, on January 12, 1989, that claimant suffers from a 60.3 percent binaural impairment. Cl. Ex. 5. Also after examining claimant three times, Dr. Schwager, on August 16, 1989, concluded that claimant has a 43.1 percent binaural impairment, 70 percent of which is due to noise. Cl. Ex. 8. On December 11, 1989, claimant underwent an automated evaluation. The test results revealed a binaural impairment of 82.8 percent.[1] Cl. Ex. 7. Mr. Seipp, an audiologist, determined, on January 17, 1990, that claimant suffers from a 62.18 percent binaural impairment. Cl. Ex. 3 at 10, ex. 2. On January 29, 1990, Dr. Baker diagnosed claimant as having a noise-induced high frequency hearing loss; however, because of inaccurate test responses, he was unable to compute the percentage of loss. Emp. Ex. 1; Tr. at 147.

A hearing was held on February 12, 1990, wherein the parties stipulated, inter alia, that the date of claimant's injury is July 26, 1988, claimant's average weekly wage as of that date was $525.75, and employer has paid neither compensation nor medical benefits. Decision and Order at 1; Tr. at 4. The parties disputed the cause, nature and extent of claimant's hearing loss. The administrative law judge found that evidence of claimant's hypertension and the lack of harmful noise levels at employer's facility is sufficient to rebut the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's hearing loss to his employment. The administrative law judge also found the evidence insufficient to establish causation based on the record as a whole. Therefore, he denied benefits. Decision and Order at 11-14. Claimant appeals the decision. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption that claimant's hearing loss is work-related. It is undisputed that claimant is entitled to invocation of the Section 20(a) presumption. Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. Peterson v. General Dynamics Corp., 25 BRBS 71, 78 (1991), aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992); Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a)

[1]This percentage has been calculated using the formula in the American Medical Association Guides to the Evaluation of Permanent Impairment (3d ed. 1988), as the binaural impairment of 429496703.2 percent on the printout is clearly incorrect. Cl. Ex. 7.

presumption no longer controls and the issue of causation must be resolved on the whole body of proof. Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990). In this case, the administrative law judge credited testimony and reports from Mr. Toothman, the Director of Occupational Health at Bethlehem Steel (Pennsylvania), Dr. Baker and Dr. Rosell to rebut the presumption.

Mr. Toothman testified regarding studies that have been performed at Sparrows Point to determine noise levels at that facility. He testified that the levels of noise at the shipyard require the use of hearing protection devices;[2] however, he stated that use of the devices brings the noise levels reaching the human ear down to levels permitted by the Occupational Safety and Health Act (OSHA). Emp. Ex. 9; Tr. at 115. When asked whether claimant's hearing loss is noise-related, Mr. Toothman concluded:

> Based on the noise exposure information, based on the protection factors provided by the hearing protection, and based on the fact that [claimant] wore hearing protection, it's my opinion that he was adequately protected from noise at the work place.

Tr. at 124-125 (emphasis added). The administrative law judge found that Dr. Baker's testimony supports Mr. Toothman's conclusion that claimant had adequate protection from harmful noise at work.[3] Decision and Order at 13-14.

Although the administrative law judge accepted Mr. Toothman's conclusions concerning the noise levels at employer's facility,

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[2]Claimant has worn hearing protection since he started working for employer. Tr. at 73, 86-87.

[3]Based on, and in support of, Mr. Toothman's testimony, Dr. Baker revised his earlier diagnosis that claimant's hearing loss is noise-induced and surmised that if claimant

> was in fact exposed to noise under [the permitted] level and in addition wore hearing protection, then it's very difficult to understand how he could become impaired with a hearing loss due to noise. . . .

Tr. at 151. However, it appears Dr. Baker interpreted the facts to mean that claimant was exposed to low levels of noise in addition to wearing hearing protection, which further lowers noise levels. Dr. Baker's interpretation is incorrect. Mr. Toothman testified that noise levels at the Sparrows Point facility required the use of hearing protection and use of that protection lowers the noise levels into the permissible range. Tr. at 114-118.

the Board has never held that compliance with OSHA standards is sufficient to rebut the Section 20(a) presumption. Additionally, although Mr. Toothman presented abundant data regarding the efforts of employer to monitor noise levels and protect its employees from injurious exposure, he admitted he did not know claimant's levels of exposure over his years of employment. Emp. Ex. 9 at 45. Mr. Toothman also would not advance the opinion that claimant's employment did not contribute to, aggravate or cause claimant's hearing loss. He only stated that claimant "was adequately protected from noise at the work place." Tr. at 124-125; see also Emp. Ex. 9 at 40-41. Consequently, Mr. Toothman's testimony does not eliminate claimant's employment as a cause of his hearing loss and, therefore, is insufficient to rebut the Section 20(a) presumption. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 96 (1991); Peterson, 25 BRBS at 78.

The administrative law judge also credited the opinions of Drs. Baker and Rosell in finding the Section 20(a) presumption rebutted because they agreed claimant's hypertension could contribute to his hearing loss.[4] Decision and Order at 13-14. The administrative law judge found that claimant's "hypertension alone would constitute 'substantial evidence' to rebut the presumption." Id. While the doctors agree it is possible for high blood pressure to cause hearing loss, Dr. Rosell testified that claimant's hearing loss was not typical of loss from hypertension. Tr. at 29, 51, 56, 148. He stated that a loss from high blood pressure is a systematic condition, not local to the ear, which would generally occur because of a vascular accident and result in a sudden hearing loss. Tr. at 47, 51, 56-58. Dr. Rosell concluded that claimant's hearing loss is noise-induced because it occurred gradually over time. Tr. at 57. Dr. Baker did not attribute claimant's entire hearing loss to his hypertension, though he did acknowledge that claimant's high blood pressure contributed to the loss. Tr. at 151-152. Contrary to the administrative law judge's findings, neither of these opinions rules out claimant's employment and exposure to noise as a cause of or contributor to his hearing loss. Caudill, 25 BRBS at 96; Peterson, 25 BRBS at 78. If any part of claimant's hearing loss is noise-induced, his entire impairment is compensable. Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989), aff'd in pertinent part sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). That hypertension may be a cause of claimant's hearing loss is not sufficient to rebut the Section 20(a) presumption linking claimant's hearing loss to his employment, as it is employer's burden to present substantial evidence that the conditions of employment did not cause, aggravate, or contribute to claimant's hearing loss. See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976).

[4]Claimant suffers from high blood pressure which he has, at various times, left uncontrolled. He has been sent home from work because of headaches and dizzy spells caused by his uncontrolled high blood pressure. Emp. Ex. 5; Emp. Ex. 10 at 14-15, 20-21.

Because none of the evidence credited by the administrative law judge severs the potential causal connection between claimant's harm and his working conditions, and as there is no other evidence of record which eliminates claimant's employment as a cause of or a contributor to his hearing loss, the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Consequently, claimant's injury is work-related as a matter of law. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988). Therefore, we reverse the administrative law judge's finding that claimant's injury is not work-related, and we remand the case for him to resolve any remaining issues.

Accordingly, the Decision and Order of the administrative law judge is reversed, and the case is remanded for further findings in accordance with this decision.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge